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prohibited by the longstanding Treasury Regulations.[2] Petitioner now concedes that it should not have taken a deduction for the costs incurred in acquiring and reconditioning the trailers but should have, in general, added such costs to inventory and thus deferred such deductions until the reconditioned trailers were sold (R. 90a; Supp. R. 1b–6b). Petitioner also now concedes that it must use the lower of cost or market method of inventory accounting for all years after 1959 (Pet. 6, 5a). The sole issue presented by this case is whether, as the lower courts held, petitioner must use this concededly correct method of accounting for its inventories for the years 1954 through 1956 as well as for subsequent years.

The Commissioner first questioned petitioner's method of inventorying used trailers at $1 each in 1948 with respect to tax years beginning in 1942. However, the Commissioner recognized that if he required petitioner to change to a correct method of inventorying used trailers, petitioner would get an unwarranted double deduction for more than $500,000 (R. 108a–111a). Under the case law, if the Commissioner required a taxpayer to change his inventory valuation method, the taxpayer was entitled to value his opening inventory in the year of the change according to the new method. If, as in this case, the change resulted in a large increase in the taxpayer's

[2] The Regulations specifically prohibit "Taking work in process, or other parts of the inventory, at a nominal price or at less than its proper value." Treas. Regs. (1954 Code), § 1.471–2(f)(2). The substance of this provision has been part of the Regulations since 1919. See Treas. Regs. 45, Art. 1582 (1919 ed.).

inventory, he would get a second deduction for costs which he had already deducted.[3] Because the Commissioner did not wish to give petitioner a second deduction for the more than $500,000 it had already improperly deducted, the Commissioner in 1950 decided to permit petitioner to continue using its erroneous method of inventorying used trailers at $1 each (R. 111a–112a).

On its returns for 1954 through 1956, the tax years here in question, the taxpayer continued to employ the $1 per unit inventory method. In 1959 the Commissioner notified the taxpayer that beginning with used trailers acquired after the close of 1953, and for all taxable years still open, it was required to use the lower of cost or market method. The Tax Court, in a reviewed opinion (two judges dissenting without opinion), held that petitioner's method of valuing its inventory of used trailers at $1 each was incorrect, that the Commissioner was not estopped from requiring petitioner to change to the lower of cost or market method, and that the Commissioner could properly

[3] For example, assume that in 1947 the taxpayer acquired 100 units at a cost of $10 each (*i.e.*, $1,000) and that at the end of 1947 he had all 100 units on hand. If he improperly inventoried the items at a nominal cost of $1 each, he would take a current deduction in 1947 of $900 (100 units x $9) and defer the deduction for the remaining $100—*i.e.*, the amount included in inventory (100 units x $1). If the Commissioner in 1948 required him to switch to a proper cost method of valuing inventory, the taxpayer would be entitled to increase his opening 1948 inventory from $100 (100 units x $1) to $1,000 (100 units x $10). Thus, when the taxpayer sold these 100 units he would get a second deduction for the $900 he had already deducted in 1947 at the time of acquisition.

make the change for all open years, including 1954 through 1956. However, the Tax Court also held that because the Commissioner had initiated the change in accounting method, the taxpayer was entitled to use the new method to compute its 1954 opening inventory even though this resulted in an inventory increase—and thus a double deduction—of more than $2,500,000.[4] (R. 125a–138a.)

In the court of appeals, petitioner conceded that the Commissioner could require the change and contended only that he could not make it retroactive to 1954 (Pet. 6; Pet. 5a). The Commissioner did not appeal from that part of the decision which gave petitioner a double deduction of more than $2,500,000. The court of appeals affirmed (Pet. 5a–8a).

The decision below is correct, and there is no conflict between the circuits or other basis for review by this Court. Indeed, far from contravening "the intendment and rationale" of decisions of this Court or conflicting with decisions of the courts of appeals, as the petitioner asserts (Pet. 6), the decision below is in complete accord with the decided cases.

1. Petitioner's sole contention in the court below—which was properly rejected—was that the Commissioner's acquiescence in 1950 in its erroneous method of valuing its used trailer inventory constituted a "legislative" determination which could not be "retroactively" changed in 1959 so as to require peti-

[4] The reason for this double deduction is the same as that explained *supra*, in fn. 3, p. 3. The Tax Court held that 1954 Code § 481 had not changed the previous case law on this point (R. 135a–138a).

tioner to use a correct method for the open years 1954–1956 (Pet. 5a–8a). In its petition for certiorari petitioner has apparently abandoned that position, and now contends "that the Commissioner does not have power to reverse retroactively a ruling that does not constitute a mistake of law," that the correctness of a particular method of accounting involves a question of "fact" rather than of "law", that the Commissioner thus did not commit a "mistake of law" when in 1950 he permitted petitioner to continue using its erroneous method of inventory accounting, and that consequently the Commissioner was precluded from requiring petitioner in 1959 to change to a correct method for 1954–1956 (Pet. 6–7, 14–15). Since these contentions were not raised below, they are not properly before the Court. Cf. *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418; *Helvering* v. *Wood*, 309 U.S. 344, 349; *McCullough* v. *Kammerer Corp.*, 323 U.S. 327; *Duignan* v. *United States*, 274 U.S. 195, 200.

2. In any event, petitioner's contention is without substance. Petitioner concedes (Pet. 15–18), as it must, that the Commissioner has broad discretionary authority to permit or require a taxpayer to use a method of accounting which clearly reflects income. 1954 Code §§ 446, 471, 481, 7805; Treas. Regs. (1954 Code), §§ 1.446–1, 1.471–2; *United States* v. *Catto*, 384 U.S. 102, 114; *Schlude* v. *Commissioner*, 372 U.S. 128, 133–135; *Commissioner* v. *Hansen*, 360 U.S. 446; *Brown* v. *Helvering*, 291 U.S. 193, 204–205; *Lucas* v.

American Code Co., 280 U.S. 445, 449. The Commissioner's broad power to permit or require a change in a particular accounting method does not, as petitioner assumes, depend on whether the propriety of the method is characterized as a question of law or of fact. Rather, it turns on whether the method "clearly reflect[s] income." 1954 Code, §§ 446(b), 471. Moreover, it is well established that the Commissioner generally has the right to correct mistakes in a taxpayer's return for all past years which are not yet barred by the statute of limitations, even if the correction is a change of position on the Commissioner's part. *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183–186; *Burnet* v. *Porter*, 283 U.S. 230; *Dixon* v. *United States*, 381 U.S. 68; *McIlhenny* v. *Commissioner*, 39 F. 2d 356 (C.A. 3). Here petitioner has conceded that the lower courts were correct in holding that its method of valuing inventories at a nominal amount ($1 per item) specifically violated the Regulations and failed clearly to reflect its income. Therefore, unless the Commissioner is for some reason estopped, the normal rule would permit him to correct petitioner's erroneous method of inventory valuation for all open years, including 1954–1956.

In 1950 the Commissioner declined to require petitioner to change from its improper method of valuing used trailers at $1 to the proper lower of cost or market method, because any such change initiated by the Commissioner would have allowed petitioner to obtain a double deduction for more than $500,000 in expenses it had already deducted. However, it is

quite clear, as the Tax Court found, that the Commissioner never "forced petitioner to inventory its used trailers at $1 each," but that the Commissioner, anxious to avoid giving petitioner an unwarranted deduction of more than $500,000, merely "yielded to petitioner's wishes in this regard" and declined to require petitioner to make the change (R. 120a–121a). It is equally clear that petitioner could at all times itself have initiated a change to the lower of cost or market method and that the Commissioner would have consented to such a change if petitioner would have agreed to a reasonable settlement of the double deduction problem (R. 110a–112a). Thus the Commissioner never approved or misled petitioner into believing that he had approved its erroneous inventory method. The Commissioner merely declined to initiate a change because of the cost to the revenue.

Moreover, as the Tax Court found, petitioner did not suffer any detriment because the Commissioner waited until the tax year 1954 to require petitioner to adopt a correct method of inventory valuation. Every year that petitioner used its incorrect method large amounts of income were "deferred to later years," thus allowing petitioner instead of the government to use millions of dollars that would have been paid as tax (R. 121a). Additionally, the amount of petitioner's unwarranted double deduction increased from approximately $500,000 to more than $2,500,000 because the Commissioner required it to switch to a proper method of accounting as of 1954 instead of 1942.

3. Contrary to petitioner's contention (Pet. 9–10), there is no conflict with *Commissioner* v. *O. Liquidating Corp.*, 292 F. 2d 225 (C.A. 3), certiorari denied, 368 U.S. 898, and *American Can Co.* v. *Commissioner*, 317 F. 2d 604 (C.A. 2), certiorari denied, 375 U.S. 993. In those cases, taxpayers attempted to change from an erroneous method of accounting to a correct one but would not agree to adjustments. The Commissioner, in accordance with the Regulations,[5] refused to agree to the change and the courts of appeals sustained the Commission's action even though the result was to leave the taxpayers on erroneous methods of accounting. The instant case is concerned with the Commissioner's power to require a taxpayer to change from an incorrect to a correct method of accounting, while the cited cases dealt with the Commissioner's power to deny the taxpayer's request for permission to change from an incorrect to a correct method of accounting where the taxpayer refused to agree to adjustments which were necessary to prevent distortion of income. The portion of the opinion in *John Wanamaker Philadelphia, Inc.* v. *United States*, 359 F. 2d 437, 442 (Ct. Cl.), on which the taxpayer relies (Pet. 11–12), reaffirms these principles.[6]

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[5] Treas. Regs. 111 (1939 Code) § 29.41–2; now 1954 Code, § 446(e); Treas. Regs. (1954 Code) § 1.446–1(e).

[6] The petition invites the Court to grant review in order to decide (Pet. 17) "whether the Commissioner's discretion is broad enough to permit him to require a taxpayer to continue the use of a particular accounting method, where such method is erroneous, in order to prevent a distortion of income which would result in a tax detriment to the Government." This question, which was presented in cases such as *O. Liquidating*

Nor is there any conflict with *In re Sperling's Estate,* 341 F. 2d 201 (C.A. 2), certiorari denied, 382 U.S. 827. The taxpayer there erroneously filed his returns on the cash method of accounting, and the Commissioner without recomputing his income on the accrual method, asserted a deficiency. Taxpayer contended that the Commissioner could not assert a deficiency unless he recomputed taxpayer's income on the accrual method, although taxpayer's books and records did not disclose sufficient information to enable the Commissioner to accomplish this task. The Second Circuit held that the Commissioner did not abuse his discretionary authority in concluding that, while the taxpayer's cash method of accounting was improper, it would nevertheless (in light of the lack of records) give the best available picture of his income. In the instant case, the Commissioner has not concluded that the $1 per unit method of valuing inventory would best reflect the taxpayer's income.

The instant decision does not conflict with *Dobson* v. *Commissioner,* 320 U.S. 489. The statute then in effect limited review of Tax Court decisions to questions of law. The question there was whether the Tax

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and *American Can,* is not involved in the instant case. The question properly arises in those cases where the taxpayer initiates a change and the Commissioner, acting under Section 446(e) and the pertinent regulation, withholds his consent to the change pending settlement of adjustments. Moreover, the circuits considering the question are in full agreement that the Commissioner has discretion to withhold approval. See *Commissioner* v. *O. Liquidating Corp., supra; Wright Contracting Co.* v. *Commissioner,* 316 F. 2d 249 (C. A. 5), certiorari denied, 375 U.S. 879; *American Can Co.* v. *Commissioner, supra;* See, also, *Hackensack Water Co.* v. *United States,* 352 F. 2d 807 (Ct. Cl.).

Court's application of the tax benefit rule to the facts of that case raised a reviewable question of law. The Court held that only a question of fact was involved. The Court stated, however, that it is (320 U.S. at 492–493) "a clearcut question of law" where "applicable statutes and regulations properly interpreted forbid" a method of calculation. Here the Regulations expressly forbid the $1 per unit method. Moreover, the restricted definition of questions of law adopted in that case probably has little present vitality since the scope of review of Tax Court decisions is now the same as for district court cases. 1954 Code, § 7482.

Arizona Grocery v. *Atchison Ry.*, 284 U.S. 370, upon which petitioner also relies (Pet. 7–8), did not present any question of tax accounting. It involved a general order of the Interstate Commerce Commission fixing freight rates for railways operating between certain points, pursuant to a statute giving it power to fix rates, and as the court below observed (Pet. 6a) it "is not analogous to the case before us".

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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